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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. _____

GUADALUPE R. GALLEGOS and FRANCESCA
GALLEGOS, his wife, and INGA G. GUDMUND-
SEN, in their own behalf and in behalf of
others similiarly situated and HARRY
W. HILL, Receiver of Intermoun-
tain Building & Loan Associa-
tion, a corporation,
Petitioners,

vs.

LLOYD R. SMITH, Corporation Commissioner
of the State of Oregon,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.

POINT A.

In holding that the final decree, Findings of Fact and
Conclusions of Law made by the United States District
Court for the District of Arizona in *Gallegos v. Inter-
mountain Building & Loan Association* were not res
adjudicata and binding on Oregon creditors and the Ore-

gon Corporation Commissioner and entitled to full faith and credit in Oregon, the Circuit Court of Appeals has decided an important question of Federal law in a way probably not in accord with applicable decisions of this court.

The opinion of the Circuit Court of Appeals does not discuss the effect of the Arizona decree other than to refer to *Brashear v. Intermountain Building & Loan Association*, 109 F. (2) 857 as a decision by the court on many of the questions raised in the present case. (299-300). The *Brashear* decision, Page 862, disposes of the Arizona suit by saying that while that suit "was or purported to be a class suit on behalf of named plaintiffs and others similarly situated . . . the situation of the Building and Loan Commissioner and the State Treasurer of California and the situation of the named plaintiffs in the *Gallegos* suit were not similar. Hence, the Commissioner and the Treasurer were not concluded or in any wise affected by any order or decree in the *Gallegos* suit or by anything done or said in that suit."

The *Gallegos* suit was without doubt a class suit. The Arizona District Court, on pleadings raising the issue, concluded that all Intermountain assets wherever situated were a trust to secure the obligations under the contract liens, that Intermountain was a trustee for that purpose, that all of its assets belonged in the possession of the receiver (119-123), and that the rights and title of the receiver related

back to the commencement of the suit, April 18, 1933. (123).

The Arizona case being a class suit, and all holders of certificates containing the security clause being similarly situated with the named plaintiffs, all such certificate holders were represented by the named plaintiffs. They all had a common interest in the common funds and the decree bound all of them. *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662, 35 S. Ct. 692, *Supreme Council, etc. v. Green*, 237 U. S. 531, 59 L. Ed. 1089, *Sovereign Camp of Woodmen of the World v. Bolin*, 305 U. S. 66, 83 L. Ed. 45, *Smith v. Swormstedt*, 16 How. 288, 14 L. Ed. 942, *U. S. v. Old Settlers*, 148 U. S. 427, 480, 13 Sup. Ct. 650; *Sprague v. Ticonic Natl. Bank*, 307 U. S. 161, 83 L. Ed. 1184.

The decree in such case is binding even on those whose presence as parties would have ousted the jurisdiction of the court. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356, 364-5, 41 S. Ct. 338, 341. The proper forum in which to question the validity of the decree is the court whose decree is claimed to be *res adjudicata* regardless of any public policy of the state where the decree is sought to be enforced. *Roche v. McDonald*, 275 U. S. 449, 455; 48 S. Ct. 142, 144.

The findings of fact, conclusions of law and decree were also entitled to full faith and credit under Article I, Section 8, Article VI and Article IV

of the Constitution. *Embry v. Palmer*, 107 U. S. 3, 9; *Stoll v. Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 137.

The distinction made by the Circuit Court of Appeals in the *Brashear* case between the Building and Loan Commissioner and the State Treasurer on the one hand and the certificate holders on the other seems to be without foundation. Neither the Commissioner nor the Treasurer has any personal interest in the liquidation. Their rights can be no greater than those of the creditors for whom they act. The full faith and credit clause of the Constitution and the doctrine of *res adjudicata* would be nullified if a mere nominal change in parties without substantial difference in interest prevented their application. *Throckmorton v. Hickman*, 279 F. (C. C. A. 3) 196, 201.

The title to securities deposited with the Oregon Commissioner was not changed by the deposit, *U. S. v. Knott*, 298 U. S. 544, 80 L. Ed. 1321. Therefore, when Intermountain answered in the original suit, the District Court of Arizona had jurisdiction of the parties and the subject matter, and had power to make the final decree which it did make adjudging the rights of all who were represented in the suit in the properties of the corporation.

POINT B.

In determining that petitioners were not entitled to a decision on their rights respecting the Oregon assets, the Circuit Court of Appeals has decided an important question of Federal law which appears not to have been, and should be, settled by this court.

An inspection of the complaint in this case discloses that its primary object was to secure a decree establishing a lien in favor of plaintiffs and others similarly situated upon all Intermountain real estate mortgages held or owned in Oregon, all real estate owned by the corporation in Oregon, and all assets in the hands of the State Corporation Commissioner. (38-39). The prayer for appointment of ancillary receivers and for an order to require the Corporation Commissioner to deliver all the assets in his possession to these receivers was only incidental to the main purpose of the suit. The real object of the suit was to defeat any preference in favor of the Oregon creditors.

It will be seen later in the discussion of the Oregon statutes relating to liquidation of similar associations that such proceedings are commenced by the publication of a notice requesting claimants to present their claims and the mailing of such notice to all persons appearing on the books of the corporation as creditors, shareholders, members or investors. No such notice had been published or mailed at the time of the trial of this cause in the District

Court and the record is silent as to whether any such action has since been taken.

It would seem therefore that as a matter of justice that petitioners are entitled to a determination of their rights in the court to which they resorted, regardless of whether a state liquidation is started or allowed to proceed. It has been held in a similar case that a District Court not only has jurisdiction to determine the rights of litigants in funds being administered in a state court but that in an appropriate case it is its duty to do so. *Commonwealth Trust Co. of Pittsburgh v. Bradford*, 78 F. (2) 92 affirmed by this court in 297 U. S. 613, 56 S. Ct. 600.

That this is an appropriate case for the exercise of such jurisdiction is demonstrated by the *Commonwealth Trust* case just cited, and *Clark v. Darr* (Ind.), 80 N. E. 19, 9 L. R. A. (N. S.) 460; *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432; *Torrington Co. v. Sidway-Topliff Co.* (C. C. A. 7th) 70 F. (2) 949.

POINT C.

In holding that it was unnecessary to determine whether the Oregon statute giving a preference to Oregon residents violates Article IV, Section 2, Article I, Section 10, and Article I, Section 8 of the Constitution and Section 1 of the Fourteenth Amendment thereto, the Circuit Court of Appeals has decided an important question of Federal law probably in conflict with applicable decisions of this court.

Whatever conclusion may be reached as to the

rights, if any, of the petitioners and others similarly situated, as respects assets in Oregon, there is no doubt but that those rights are substantially affected by the attempt of the Oregon Corporation Commissioner to give a preference to Oregon residents. Petitioners and others similarly situated had a contract by which Intermountain agreed to hold its mortgages (necessarily including its Oregon assets, because it did not have sufficient elsewhere) as security for its promises to them. This contract is being impaired by the Oregon legislation which directly contravenes the doctrine announced by this court in *Treigle v. Acme Homestead Assn.*, 297 U. S. 189, 80 L. Ed. 575. Petitioners were entitled to a decision of this court as to their rights. *Commonwealth Trust Co. of Pittsburgh v. Bradford*, 78 F. (2) 92, 297 U. S. 613, 56 S. Ct. 600. At least up to the time of trial of this cause, no other forum was available to petitioners because liquidation had not been commenced by the Oregon Commissioner.

POINT D.

In deciding that the procedure provided by the Oregon statutes for liquidating building and loan associations is adequate to protect nonresident creditors, the Circuit Court of Appeals has decided an important question of Federal law in a way probably in conflict with applicable decisions of this court.

The Corporation Commissioner in his Answer (48) gives as his authority for taking possession of

Intermountain assets, Section 57 of Chapter 373, Oregon Laws 1931, Section (25-398, Oregon Laws Ann. 1935 Supp.) which provides that the Commissioner, when he deems the capital of an association impaired, may take possession of its assets and operate it or return it to its members, or if he deems it advisable, "liquidate as elsewhere provided in this act."

The provisions relating to liquidation are found in Section 25-3,101 of the same supplement to the code. That section is set out in full in the appendix. Its main features are these:

The Commissioner shall first prepare a complete statement of the assets of the association and shall then cause "due notice to be given by publication for four successive weeks . . . requesting all persons having claims . . . to present them . . . at a place and within a time to be designated in such notice and he shall cause a copy of such notice to be mailed to all persons whose names appear of record upon its books. . . ." On the expiration of the time fixed, the Commissioner shall prepare a schedule of claims "specifying by classes those that have been approved and those that have been disapproved." "Claims that are rejected shall be so marked with the date of such rejection and within ten (10) days thereafter notice thereof shall be mailed to all claimants whose claims have been so rejected. Action to enforce payment of any rejected claim must be filed . . . within thirty (30) days from and after the date of such notice; otherwise all such actions shall for-

ever be barred." After paying his expenses the Commissioner "shall distribute and pay dividends in liquidation . . . as soon as funds are available . . . until all the assets have been realized upon a final dividend in liquidation shall be declared and paid."

Provision is made for filing of a final account and objections thereto, but only after final distribution. The act also directs the Commissioner to apply to the Circuit Court for an order confirming any action theretofore taken by him and to apply for instructions, and further provides that said court shall have power "on petition of the Corporation Commissioner and notice to all persons affected thereby to declare the rights, status and other legal relations of all persons interested as debtor, creditor or member of such association."

It will be observed of these provisions that no resort to a court is necessary until after liquidation is under way and then the first application is for confirmation of matters done; that there is no minimum period of notice required to be given to creditors and certificate holders, that matter being left entirely to the Commissioner's discretion except as that discretion may be said to be qualified by the words "due notice"; that claims may be classified, thereby permitting preferences to be given to some without rejecting those given a lower classification, with no provision for notice of the classifications adopted; that individual action must be brought on a rejected claim within thirty days; there being no

provision for a class suit to determine the rights of all in a class; and that, if individual action is not brought within thirty days, the claim is forever barred; if, therefore, putting a claim into a lower classification may be considered a rejection of the claim, each person given the lower classification must bring action within thirty days, there being no provision in this statute, as there is in various other statutes, that certificate holders whose claims appear on the books may be entitled to share pro rata without filing a claim or bringing action.

If it is argued that the Corporation Commission may bring a suit to determine the rights of all certificate holders, the time of bringing the suit is not fixed and the statute itself would bar all claims that have been rejected unless action is brought thereon within thirty days after the rejection. Therefore, the within thirty days after the notice of rejection. Therefore, the suit to determine rights must be brought and determined prior to the expiration of the thirty day period.

It was said by this court in *Roller v. Holly*, 176 U. S. 398, that the right of the citizen to due process of law "must rest upon a basis more substantial than favor or discretion." In *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424, this Court said: "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires." In *Wuchter v. Pizzutti*, 276

U. S. 13, the Court said that provisions for reasonable notice must be contained in the statutes themselves.

When it is recalled that there were 3840 claimants with an average investment of a fraction under \$750.00 residing for the most part in six states (272 claimants lived outside these six states) it is plain that to require each claimant to bring an action at law in each of the six states to insure his receiving his fair share of the assets would leave him with no practical remedy. Certainly such a remedy could not be called adequate.

Without going outside the record it cannot be said whether the Corporation Commissioner has ever taken any of the three steps which the statute commands as the start of liquidation—the preparation of the statement of assets of the association, the publication of notice to creditors, or the mailing of copies of the published notice to creditors. The record does show that none of these steps had been taken up to the time of trial in 1937 (143-5). Therefore, no notice had been given to the certificate holders, no opportunity had been offered to them to present their claims in any Oregon liquidation, and they are without any remedy, unless a remedy is available to them in this suit.

The Oregon Commissioner's examiner made five examinations of the condition of Intermountain in 1927, 1928, 1929, 1932 and 1933. In September, 1933, his examination disclosed that the association's condition was "very, very bad." (243). The conditions he found had not developed in a day and part of it

covered a long period of time. (243). He knew that there were various suits pending against Intermountain. (241-2). The condition of Intermountain had been discussed by the Building & Loan Commissioners of various states as early as August, 1933. (211). The only action the Commissioner took was to require the two deposits in September and October, 1933, previously referred to, thereby undertaking to secure a preference for the Oregon residents, until March, 1934. (143). The Oregon Commissioner then took possession of the Oregon assets and began operation of the company's affairs in Oregon, but did not undertake its liquidation.

This inaction of the Oregon Commissioner is comparable with that of the Utah Bank Commissioner which the Arizona District Court and the Circuit Court of Appeals said justified taking the liquidation out of the Utah Commissioner's hands and placing it in the hands of the Arizona receiver—a decision as to which this court refused certiorari.

Respectfully submitted,

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